

1 affirming the Commissioner's decision. On August 21, 2007, the parties
2 consented to proceed before the undersigned United States Magistrate
3 Judge pursuant to 28 U.S.C. § 636(c). The Court has taken the parties'
4 Joint Stipulation under submission without oral argument.

5
6 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
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8 On December 21, 2003, plaintiff filed an application for SSI, and
9 on February 6, 2004, plaintiff filed an application for DIB, in which
10 she claims to have been disabled since August 1, 2003. (Administrative
11 Record ("A.R.") 91-93, 370.) After the denial of plaintiff's claims at
12 the initial level, plaintiff timely requested a hearing, and on April
13 20, 2005, plaintiff, who was represented by counsel, testified at a
14 hearing before Administrative Law Judge Dale A. Garwal ("ALJ"). (A.R.
15 376-401.) Plaintiff's claims were denied by the ALJ on August 2, 2005.
16 (A.R. 43-48.) Plaintiff appealed the ALJ's decision, and the Appeals
17 Council granted plaintiff's request for review. (A.R. 34-38, 73.) On
18 November 7, 2005, the Appeals Council vacated the ALJ's decision and
19 remanded the case for further proceedings. (A.R. 49-51.)
20

21 On February 28, 2006, plaintiff, who was again represented by
22 counsel, testified at a supplemental hearing before the same ALJ. (A.R.
23 402-416.) On March 22, 2006, the ALJ again denied plaintiff's claims,
24 and the Appeals Council subsequently denied plaintiff's request for
25 review of the ALJ's decision. (A.R. 6-8, 26-32.)
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1 **SUMMARY OF ADMINISTRATIVE DECISION**

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3 The ALJ found that plaintiff meets the nondisability requirements
4 for a POD and DIB, is insured for benefits through March 22, 2006, and
5 has not engaged in substantial gainful activity since August 1, 2003,
6 the alleged onset of her disability. (A.R. 31.)

7
8 The ALJ found that plaintiff has "severe" hepatitis C and a history
9 of depression, but she does not have an impairment that meets or equals
10 the criteria of any impairment listed in Appendix 1, Subpart P,
11 Regulations No. 4. (A.R. 32.) Additionally, the ALJ concluded that
12 plaintiff's assertions regarding her limitations are not entirely
13 credible. (*Id.*)

14
15 The ALJ found that plaintiff retains the residual functional
16 capacity to perform her past relevant work as a sales person, actor,
17 insurance billing person, and receptionist. (A.R. 27, 32.)
18 Accordingly, the ALJ concluded that plaintiff was not disabled within
19 the meaning of the Social Security Act during the time period at issue.
20 (A.R. 32.)

21
22 **STANDARD OF REVIEW**

23
24 This Court reviews the Commissioner's decision to determine
25 whether it is free from legal error and supported by substantial
26 evidence. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). The
27 Commissioner's decision must stand if it is supported by substantial
28 evidence and applies the appropriate legal standards. Saelee v. Chater,

1 94 F.3d 520, 521 (9th Cir. 1996). Substantial evidence is "more than a
2 mere scintilla but less than a preponderance -- it is such relevant
3 evidence that a reasonable mind might accept as adequate to support the
4 conclusion." Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995).

5
6 Although this Court cannot substitute its discretion for that of
7 the Commissioner, this Court nonetheless must review the record as a
8 whole, "weighing both the evidence that supports and the evidence that
9 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y. of
10 Health and Human Serv., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
11 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
12 responsible for determining credibility, resolving conflicts in medical
13 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
14 1035, 1039-40 (9th Cir. 1995). This Court must uphold the
15 Commissioner's decision if it is supported by substantial evidence and
16 free from legal error, even when the record reasonably supports more
17 than one rational interpretation of the evidence. *Id.* at 1041; *see also*
18 Morgan v. Comm'r. of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.
19 1999); Flaten v. Sec'y., 44 F.3d 1453, 1457 (9th Cir. 1995).

20 21 DISCUSSION

22
23 Plaintiff alleges the following three issues: (1) whether the ALJ
24 erred in the evaluation of plaintiff's liver impairment under Medical
25 Listing 5.05F; (2) whether the ALJ erred in applying a standard of
26 "total disability" in the evaluation of plaintiff's medical impairments

1 and functional limitations²; and (3) whether the ALJ's credibility
2 findings are improper. The Court addresses these issues below, although
3 not in the precise manner presented.

4
5 **I. The Record Must Be Further Developed Regarding Plaintiff's Liver**
6 **Impairment Before This Court Can Assess Whether The ALJ Should Have**
7 **Evaluated Plaintiff's Liver Impairment Under Medical Listing 5.05F.**
8

9 It is axiomatic that the ALJ has an affirmative duty to develop the
10 record, even if the claimant is represented by counsel. See Armstrong
11 v. Comm'r. of Soc. Sec. Admin., 160 F.3d 587, 589 (9th Cir. 1998); Brown
12 v. Heckler, 713 F.2d 441, 443 (9th Cir. 1993). This includes, *inter*
13 *alia*, the duty to compile all the relevant facts upon which the ultimate
14 adjudication of disability ultimately rests. See Miles v. Chater, 84
15 F.3d 1397, 1401 (2d Cir. 1996)(The ALJ is "duty-bound to develop a full
16 and fair record . . . giving individualized consideration to each claim
17 that comes before him."); see also Sims v. Apfel, 530 U.S. 103, 110-11
18 (2000)("It is the ALJ's duty to investigate the facts and develop the
19 arguments both for and against granting benefits.").

20
21 Plaintiff contends that the severity of her liver impairment meets
22 or equals the criteria set forth in Medical Listing 5.05F, and the ALJ
23 should have evaluated plaintiff's liver impairment under this Listing,
24 which states that a claimant must have:

25 _____
26 ² Plaintiff's contention that the ALJ erred in applying a "legal
27 standard of total disability" is misplaced. The ALJ's error, if any, in
28 using the language "total disability" is harmless, as he applied the
proper five-step sequential evaluation procedure in assessing
plaintiff's disability.

1 Confirmation of chronic liver disease by liver biopsy
2 (obtained independent of Social Security disability
3 evaluation) and one of the following:
4

5 1. Ascites not attributable to other causes, recurrent or
6 persisting for at least 3 months, demonstrated by abdominal
7 paracentesis or associated with persistent hypoalbuminemia of
8 3.0gm. per deciliter (100ml.) or less; or
9

10 2. Serum bilirubin of 2.5 mg. per deciliter (100ml.) or
11 greater on repeated examinations for at least 3 months; or
12

13 3. Hepatic cell necrosis or inflammation, persisting for at
14 least 3 months, documented by repeated abnormalities of
15 prothrombin time and enzymes indicative of hepatic
16 dysfunction.
17

18 20 C.F.R. § 404, Subpt. P, App. 1, 5.05F.
19

20 It is well-settled that the issue of whether an impairment meets or
21 equals the criteria of a particular Medical Listing is decided by the
22 relevant medical evidence. 20 C.F.R. §§ 404.1525, 404.1526, 416.925,
23 416.926. To meet a listed impairment, a claimant must establish that
24 she "meets each characteristic" of the listed impairment relevant to her
25 claim. Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999). To
26 equal a listed impairment, a claimant must establish "symptoms, signs
27 and laboratory findings at least equal in severity and duration" to the
28 characteristics of a relevant listed impairment. *Id.*

1 In this case, it is undisputed that the objective medical evidence
2 regarding plaintiff's liver impairment includes a laboratory report
3 showing elevated liver enzymes, an abdominal ultrasound indicating
4 "cirrhosis with portal hypertension manifested by portosystemic
5 collaterals," and a liver biopsy obtained independent of plaintiff's
6 disability evaluation, which confirms chronic hepatitis C. (A.R. 341,
7 351, 356-57.) However, it is unclear whether plaintiff's liver
8 impairment "meets or equals" the requirements of Medical Listing 5.05F,
9 because the record has not been fully developed and the ALJ did not
10 retain a medical expert to testify at the hearing regarding the nature
11 and extent of plaintiff's liver impairment. As a result, the ALJ's
12 conclusion that plaintiff "does not have an impairment that meets or
13 equals the criteria of any impairment listed in Appendix 1, Subpart P,
14 Regulations No. 4," (A.R. 32) is not supported by substantial evidence
15 and constitutes error.

16
17 At the February 2006 supplemental hearing, plaintiff's counsel
18 testified that plaintiff "has been referred for other testing, but it's
19 all going to be done in late March [2006], and that's regarding the
20 hepatitis and the consultation regarding the neck problem." (A.R. 410-
21 11.) Additionally, plaintiff testified that she had not, "as of yet,"
22 been prescribed medication to treat her hepatitis C and had not "gotten
23 into their liver clinic yet" at Parkland Health & Hospital System
24 ("Parkland"), the county facility in Texas at which she was then being
25 treated. (A.R. 411.) Moreover, after the hearing, plaintiff submitted
26 two letters from Parkland, both of which indicate that plaintiff had
27 doctors' appointments scheduled on March 10 and 14, 2006. Despite
28 plaintiff's testimony and the submission of letters from Parkland, the

1 ALJ made no effort to obtain any supplemental medical records and,
2 therefore, failed to ascertain the extent of the plaintiff's liver
3 impairment. As it has been two years since the hearing, it is likely
4 that supplemental medical records exist that reflect the nature,
5 severity, and duration of plaintiff's liver impairment.

6
7 On remand, the ALJ shall obtain all of plaintiff's medical records
8 from February 28, 2006, through the present. If necessary to assess
9 those records and plaintiff's condition properly, the ALJ shall obtain
10 an updated consultative examination of plaintiff and/or retain a medical
11 expert to evaluate all of plaintiff's medical records as they relate to
12 the severity and duration of plaintiff's liver impairment. Based upon
13 such additional evidence, the question of whether plaintiff's liver
14 condition "meets or equals" the criteria of Medical Listing 5.05F can
15 then be evaluated on a fully developed record.

16
17 **II. The ALJ Erred In Rejecting Plaintiff's Subjective Pain Testimony.**

18
19 The law is well-settled that, once a disability claimant produces
20 evidence of an underlying physical impairment that is reasonably likely
21 to be the source of her subjective symptom(s), all subjective testimony
22 as to the severity of the symptoms must be considered. Moisa v.
23 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947
24 F.2d 341, 345 (9th Cir. 2001)(*en banc*); see also 20 C.F.R. §§
25 404.1529(a), 416.929(a) (explaining how pain and other symptoms are
26 evaluated). Moreover, "unless an ALJ makes a finding of malingering
27 based on affirmative evidence thereof, he or she may only find an
28 applicant not credible by making specific findings as to credibility and

1 stating clear and convincing reasons for each." Robbins v. Social Sec.
2 Admin., 466 F.3d 880, 883 (9th Cir. 2006); see Smolen, 80 F.3d at
3 1283-84 ("Once a claimant meets the *Cotton* test and there is no
4 affirmative evidence suggesting she is malingering, the ALJ may reject
5 the claimant's testimony regarding the severity of her symptoms only if
6 he makes specific findings stating clear and convincing reasons for
7 doing so."); see also Lester v. Chater, 81 F.3d 821 (9th Cir. 1996).
8 Further, the ALJ's credibility findings must be "sufficiently specific"
9 to allow a reviewing court to conclude that the ALJ rejected the
10 claimant's testimony on permissible grounds and did not arbitrarily
11 discredit the claimant's testimony. Moisa, 367 F.3d at 885.

12
13 In this case, the ALJ concluded that plaintiff's "allegations of
14 significant pain and physical restrictions are not supported by the
15 objective medical evidence" and there are "a number of inconsistencies
16 in [plaintiff's] statements . . . which erode her credibility." (A.R.
17 30.) These conclusions are not supported by substantial evidence.
18 Contrary to the ALJ's assertion that plaintiff's subjective pain
19 complaints "are not supported by the objective medical evidence," (*Id.*)
20 the record is replete with objective medical evidence that establishes
21 that plaintiff has chronic liver disease, a severe medically
22 determinable impairment which can reasonably be expected to produce the
23 symptoms about which plaintiff testified, *to wit*, weakness, fatigue, and
24 pain. (A.R. 372, 410.)

25
26 As the ALJ cites no evidence of malingering by the plaintiff, the
27 ALJ's reasons for rejecting plaintiff's credibility must be "clear and
28 convincing." Robbins, 466 F.3d at 883. Although the ALJ points to "a

1 number of inconsistencies in [plaintiff's] statements" as a basis for
2 discrediting her credibility, the inconsistencies cited do not seriously
3 undermine plaintiff's credibility. For example, the ALJ notes that
4 plaintiff was inconsistent when she testified that she had a "lymphoma"
5 in her neck, when she actually had a "lipoma." (A.R. 30.) As plaintiff
6 has a high school education and no medical training, it is not
7 unreasonable to assume that this was simply a misstatement, rather than
8 an inconsistency having any bearing on her credibility. In addition,
9 the ALJ notes that plaintiff's testimony was inconsistent in that she
10 complained of depression and insomnia, but failed to seek mental health
11 treatment. However, at the hearing, plaintiff explained that she
12 believed her depression was related to her medical problems and was not
13 an independent psychiatric disorder. Thus, the "inconsistencies" the
14 ALJ cites as bases for discrediting plaintiff's subjective complaints
15 constitute neither clear nor convincing reasons for rejecting
16 plaintiff's credibility.

17
18 Further, in support of his conclusion that plaintiff's subjective
19 complaints are "not entirely credible," (A.R. 32) the ALJ notes that
20 "there are large gaps of time between visits to her treating physician
21 or any other health care professional [to] seek[] relief from her stated
22 discomfort." (A.R. 31.) While an unexplained failure to seek treatment
23 may cast doubt on a claimant's credibility, such an inference is
24 unreasonable where plaintiff is indigent. See Fair v. Bowen, 885 F.2d
25 597, 602 (9th Cir. 1989). Indeed, the Ninth Circuit has "proscribed the
26 rejection of a claimant's complaints for lack of treatment when the
27 record establishes that the claimant could not afford it." Regennitter
28 v. Commissioner, 166 F.3d 1294, 1297 (9th Cir. 1999); see Smolen, 80

1 F.3d at 1284; see also Gamble v. Chater, 68 F.3d 319, 322 (9th Cir.
2 1995)("[a]llthough progress has been made in providing affordable medical
3 care to the needy . . . many Americans are without the means or
4 opportunity to obtain necessary medical care. Social Security
5 disability and SSI benefits exist to give financial assistance to
6 disabled persons because they are without the ability to sustain
7 themselves. It flies in the face of the patent purposes of the Social
8 Security Act to deny benefits to someone because he is too poor to
9 obtain medical treatment that may help him.")(citations omitted).

10
11 In the present case, the ALJ ignored plaintiff's testimony at both
12 hearings that she was unable to pursue more aggressive medical care for
13 her liver disease and other medical impairments due to her lack of
14 financial resources and medical insurance. In fact, as a result of her
15 indigence, she had to resort to LAC-USC Medical Center, a county
16 facility in California, which provided her medical care on a very
17 limited basis. Plaintiff testified that, due to her desperate financial
18 situation, she was forced to move to Texas in August 2005, where she had
19 to re-establish eligibility for free medical care at Parkland, another
20 county facility, and was in the process of obtaining referrals for their
21 liver clinic and liver specialists. (A.R. 361-367, 410-412, Joint Stip.
22 at 7-8.) Thus, the ALJ's reliance on plaintiff's "gaps in treatment" to
23 support the ALJ's credibility finding constitutes error.

24
25 Finally, the ALJ erred in relying on plaintiff's ability to perform
26 simple, daily activities to support his conclusion that plaintiff's
27 testimony was not credible. The ALJ's casual reference to plaintiff's
28 daily activities to support his adverse credibility finding fails to

1 demonstrate how plaintiff's ability to perform basic self-care
2 activities and light household chores translates into the ability to
3 engage in full-time work. (A.R. 30.) See Reddick v. Chater, 157 F.3d
4 715, 722 (9th Cir. 1998)(only if the level of activity were inconsistent
5 with claimant's claimed limitations would these activities have any
6 bearing on claimant's credibility); Cooper v. Bowen, 815 F.2d 557, 561
7 (9th Cir. 1987)(disability claimant need not 'vegetate in dark room' in
8 order to be deemed eligible for benefits); Gonzalez v. Sullivan, 914
9 F.2d 1197, 1201 (9th Cir. 1990)(daily activities may not be relied upon
10 to support an adverse credibility decision where those activities do not
11 affect the claimant's ability to perform appropriate work activities on
12 an ongoing and daily basis); Fair, 885 F.2d at 602 ("The Social Security
13 Act does not require that an individual be utterly incapacitated to be
14 eligible for benefits, and many home activities may not be easily
15 transferable to a work environment where it might be impossible to rest
16 periodically or take medication.").

17
18 Therefore, the ALJ's conclusion, that plaintiff's "assertions
19 concerning her limitations are not entirely credible" (A.R. 32), is not
20 adequately supported in accordance with the proper legal standards and
21 constitutes reversible error. On remand, unless there is affirmative
22 evidence showing that plaintiff is malingering, the ALJ must set forth
23 "clear and convincing" reasons, if they exist, for discrediting
24 plaintiff's credibility, that are "sufficiently specific" to allow a
25 reviewing court to conclude that the ALJ rejected plaintiff's subjective
26 symptom statements on legally permissible grounds. Lester, 81 F.3d at
27 834; Moisa, 367 F.3d at 885. If the ALJ concludes on remand that
28 plaintiff is malingering, then he must state that conclusion and set

1 forth the evidence supporting that conclusion and his consequent
2 disbelief of plaintiff's credibility.

3
4 **III. Remand Is Required.**

5
6 The decision whether to remand for further proceedings or order an
7 immediate award of benefits is within the district court's discretion.
8 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
9 useful purpose would be served by further administrative proceedings, or
10 where the record has been fully developed, it is appropriate to exercise
11 this discretion to direct an immediate award of benefits. *Id.* at 1179
12 ("the decision of whether to remand for further proceedings turns upon
13 the likely utility of such proceedings"). However, where there are
14 outstanding issues that must be resolved before a determination of
15 disability can be made, and it is not clear from the record that the ALJ
16 would be required to find the claimant disabled if all the evidence were
17 properly evaluated, remand is appropriate. *Id.*

18
19 Here, remand is the appropriate remedy to allow the ALJ the
20 opportunity to remedy the above-mentioned deficiencies and errors. *See,*
21 *e.g.*, Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for
22 further proceedings is appropriate if enhancement of the record would be
23 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
24 1989)(remand appropriate to remedy defects in the record).

25
26 **CONCLUSION**

27
28 Accordingly, for the reasons stated above, IT IS ORDERED that the

1 decision of the Commissioner is REVERSED, and this case is REMANDED for
2 further proceedings consistent with this Memorandum Opinion and Order.

3
4 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
5 copies of this Memorandum Opinion and Order and the Judgment on counsel
6 for plaintiff and for defendant.

7
8 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

9
10 DATED: March 28, 2008

11 _____/s/
12 MARGARET A. NAGLE
13 UNITED STATES MAGISTRATE JUDGE
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